

COASTAL STATES ENERGY CO.

IBLA 86-1232

Decided November 3, 1987

Appeal from a decision of the Utah State Office, Bureau of Land Management, readjusting coal lease U-0149084.

Affirmed.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

2. Appeals: Generally -- Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

Where the Forest Service issues a decision determining that certain special stipulations should be included in a readjusted coal lease on National Forest lands and provides the right to appeal that decision through the Forest Service appeals procedures in 36 CFR 211.18, that review procedure must be utilized to challenge directly the special stipulations.

3. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

In accordance with 43 CFR 3473.3-2 (a)(3), the BLM authorized officer may, if conditions warrant, set a royalty rate of less than 8 percent, but not less than 5 percent, for coal removed from an underground mine. However, where BLM has established an 8-percent royalty rate, and, on appeal, the lessee argues that conditions warrant a lesser rate, the Board need not remand for a determination by BLM, but will affirm, where the record shows the lease is nonproducing and no production is expected in the near future.

APPEARANCES: Kevin L. Yocum, Esq., Salt Lake City, Utah, and Brian E. McGee, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Coastal States Energy Company (Coastal States) appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated April 21, 1986, which overruled its objections to BLM's readjustment of coal lease U-0149084.

The record shows that coal lease U-0149084 was issued under the authority of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 207 (1964), effective June 1, 1966, for the NE 1/4, N 1/2 SE 1/4, sec. 12, T. 22 S., R. 4 E., Salt Lake Meridian, Sevier County, Utah, within the Fishlake National Forest. The original lease contained a royalty term appended to lease section 2(c), calling for payment of 15 cents per short ton for coal mined by underground methods and 17-1/2 cents per short ton for coal mined by surface methods during the first 10-year lease period. For the remainder of the first 20-year period, the rates were raised to 17-1/2 cents per short ton for underground mined coal and 20 cents per short ton for surface mined coal. The original lease contained no representation as to royalty rate after the end of the first 20-year period. Pursuant to the statute and the express terms of section 3(d) of the lease, BLM retained the right to readjust and fix royalties and other terms and conditions of the lease at the end of 20 years, i.e., on June 1, 1986.

On May 31, 1984, BLM notified Coastal States that the terms and conditions of coal lease U-0149084 would be readjusted under the provisions of 43 CFR Subpart 3451. By decision dated December 2, 1985 (6 months prior to the end of the 20-year period), BLM provided Coastal States with the readjusted terms and conditions, including numerous special stipulations prescribed by the Forest Service, for lease U-0149084. BLM cited section 3(d) of the lease and 43 CFR 3451.1(a)(1) and (2) as authority for its action. BLM allowed Coastal States 60 days to file objections to the new terms and conditions. Coastal States filed objections and BLM rejected most of those objections in its April 21, 1986, decision. 1/ Coastal States filed a timely appeal.

At the time of issuance of the original lease, section 7 of the MLA, 30 U.S.C. § 207 (1964), provided:

Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made

1/ BLM sustained one objection. Appellant questioned a change in the wording of section 2 of the lease which eliminated the lessee's right to manufacture coke or other products or to use the land for the housing and welfare of its employees. BLM amended the readjusted lease to accommodate this concern.

as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

Section 7 of the MLA was amended by section 6(a) of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (1982), to read in pertinent part: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

Section 3(d) of the original lease form specifically provides:

The lessor expressly reserves * * *:

* * * * *

(d) Readjustment of terms. The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

In the statement of reasons for appeal, appellant challenges BLM's authority to readjust the lease terms. Appellant asserts that the readjustment violates contractual lease provisions, section 7 of the MLA, 30 U.S.C. § 207 (1982), and the Fifth Amendment to the United States Constitution. Appellant argues that most provisions of FCLAA are prospective only and are not intended to be applied to pre-FCLAA leases. Appellant maintains that readjustment of the lease effectively terminates appellant's lease and creates a new lease, in breach of appellant's contractual rights. Appellant finds the readjustment to be factually unsupported, arbitrary, capricious, and an abuse of discretion. Appellant also objects to many specific terms of the lease and stipulations, including the 8-percent royalty rate for coal removed from an underground mine.

[1] BLM has the authority to readjust Federal coal leases and FCLAA and its implementing regulations apply to pre-FCLAA leases. Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987); FMC Wyoming Corp. v. Hodel, 816 F.2d 496 (10th Cir. 1987); Ark Land Co., 97 IBLA 241, 244 (1987); Coastal States Energy Co., 94 IBLA 352 (1986); Gulf Oil Corp., 91 IBLA 93, 96 (1986); Ark Land Co., 90 IBLA 43, 45 (1985). In order for the Department to reconsider its position on the readjusted provisions of a lease, an appellant must demonstrate that a protested term or condition is not in accordance with the law or proper administration of the public lands. Gulf Oil Co., 91 IBLA at 98-99.

Coastal States objects to the inclusion of special stipulations in the coal leases, arguing that BLM may not impose entirely new terms and conditions in the readjusted leases and further asserting that many of the stipulations are appropriate to exploration plans or mining plans, not to

leases. As in Coastal States Energy Co., 94 IBLA at 361, Coastal States here asserts that the special stipulations "were imposed or sanctioned, in part, upon an application of certain of BLM's unsuitability criteria or the provisions of the Surface Mining Control and Reclamation Act (SMCRA)" (Statement of Reasons at 71). Appellant states that although 43 CFR 3451.1(a)(3), when promulgated on July 19, 1979, provided for readjustment of a lease to specify that it was subject to the unsuitability criteria set out in 43 CFR Subpart 3461, this regulation was removed in its entirety on July 30, 1982.

The Secretary has broad authority to make changes when he readjusts coal leases. Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949, 951 (10th Cir. 1982); Consolidation Coal Co., 86 IBLA 60, 63-64 (1985). That authority includes the authority to impose special stipulations on a coal lease on behalf of the appropriate surface management agency, in this case the Forest Service. We reject Coastal States' assertion that upon the revocation of 43 CFR 3451.1(a)(3) (1979), the Department lost authority to impose special stipulations relating to SMCRA concerns. Coastal States Energy Co., 94 IBLA at 362.

Coastal States argues that although the Forest Service asserts the right to consent to leasing and to prescribe conditions to ensure the use and protection of National Forest lands, it does not have the right to mandate terms and conditions upon readjustment. Coastal States contends that because the lease is being readjusted, not issued, the operating requirements established by the Forest Service should not be included in the lease. Instead, it asserts the operating requirements should be imposed only pursuant to review and approval of exploration or mining plans. Coastal States raises a number of objections to the special operational stipulations in the proposed readjusted lease.

The Forest Service, which has surface management authority over the lands in this lease, required the special stipulations in accordance with 43 CFR 3400.3-1. This regulation allows coal deposits to be leased only with the consent of the surface management agency and subject to conditions that the surface management agency prescribes, ensuring the use and protection of the lands for the primary purpose for which they were acquired or are being administered. It follows that upon readjustment of a coal lease on National Forest lands, the Forest Service may prescribe special stipulations for inclusion in the readjusted lease. Because of this authority, BLM may not unilaterally amend the stipulations prescribed by the Forest Service. Coastal States Energy Co., 94 IBLA at 362.

[2] Importantly, the case file for this lease contains a decision signed on behalf of the Regional Forester, Region 4, dated November 29, 1985, entitled "Categorical Exclusion for Coal Lease Utah 0149084 Fishlake National Forest Sevier County, Utah." That decision states:

The Bureau of Land Management has requested the Forest Service to make recommendations for readjustment of terms to Coal Lease Utah 0149084 belonging to Coastal States Energy Company. This lease was issued June 1, 1966, and now is being

re-evaluated by the Bureau of Land Management to determine what if any revisions need to be made. In November 1984 the Bureau of Land Management and Forest Service jointly prepared stipulations for coal leases on Federal Land administered by the Forest Service. I have determined these stipulations should be used in adjustment of lease, Utah 0149084. A categorical exclusion is used to document this decision for the following reasons:

1. Coal mining is [in] conformance with Salina Land Use Plan.
2. There is an existing coal mine already mining coal from this lease and no new developments will occur as a result of this action.
3. There are no apparent adverse cumulative or secondary effects on the biological or physical environment.
4. No known threatened or endangered plants or animals will be affected by this action.
5. There is a lease stipulation to mitigate the development [of] impacts that could affect cultural resources.

The readjustment may be done immediately. This decision is subject to appeal pursuant to 36 CFR 211.18. [2/] [Emphasis added.]

Accompanying the decision was a copy of 21 special stipulations BLM subsequently included with the readjusted lease.

Presumably Coastal States received a copy of the Forest Service decision. 3/ If it desired to challenge directly the special stipulations, Coastal States should have sought review of the Forest Service decision. 4/ Coastal States' present objections to the special stipulations arise as a

2/ We note that "categorical exclusion" is defined as a category of actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an environmental assessment nor an environmental impact statement is required. 40 CFR 1508.4. However, in the Apr. 21, 1986, decision responding to Coastal States' objections to the proposed readjusted terms and conditions, BLM stated that the special stipulations were "being imposed pursuant to an environmental assessment completed by the Forest Service" (Decision at 9).

3/ The Forest Service regulation at 36 CFR 211.18(a)(2) provides: "(2) Written notice of a decision shall be provided to the party or parties to a written instrument issued by the Forest Service and affected by the decision, and to any other interested person who has requested in writing notification of the specific decision."

4/ In the event Coastal States did not receive a copy of the decision, fairness would dictate that it now be allowed to have its objections to the special stipulations reviewed by the Forest Service.

result of BLM's readjustment decision, and since the Forest Service has the authority to impose conditions on coal leases such as this one on National Forest lands, we cannot require that changes be made to these special stipulations. See Coastal States Energy Co., 94 IBLA at 362-63.

[3] We turn to appellant's argument that the proposed production royalty rates for coal mined by strip and auger mining methods (12-1/2 percent of the coal) and by underground mining methods (8 percent of the value of coal) are arbitrary and capricious. Prior to Coastal States Energy Co. v. Hodel, *supra*, this Board had upheld BLM's interpretation of 43 CFR 3473.3-2(a)(3) as requiring an 8-percent royalty rate on all coal removed by underground mining methods. See Coastal States Energy Co., 70 IBLA 386, 393 (1983); *but see Utah Power & Light Co.*, 80 IBLA 180 (1984). This regulation provides: "A lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant."

The Tenth Circuit Court of Appeals ruled in Coastal States Energy Co. v. Hodel, *supra*, however, that it was an error to fix the readjusted royalty rate automatically at 8 percent for all coal mined by underground methods, because such an approach "completely ignores the ensuing proviso in the same regulation that a lesser amount, but not less than 5%, may be set, 'if conditions warrant.'" Coastal States Energy Co. v. Hodel, 816 F.2d at 507. 5/

The question remains whether this particular lease warrants a royalty rate of less than 8 percent. Based on the present record, we find that it does not. In Ark Land Co., 97 IBLA 241 (1987), the Board noted that, under the lease involved in that case, coal was being mined only by surface methods and stated:

[I]nsofar as present activities are concerned, the 8 percent royalty rate for coal removed from an underground mine has no impact. There is no indication in the present case that any underground operations are occurring on the lease premises or that any resource recovery and protection plan (*see* 43 CFR 3482.1(b)) has been tendered which embraces such operations. In the absence of either on-going operations or pending specific proposals to commence underground mining, we do not believe that a lessee can establish that "conditions warrant" a royalty rate of less than 8 percent for coal removed by underground operations and, therefore, no reduction of this rate could be authorized under the present regulation. 1/

1/ If underground operations should commence sometime after coal lease readjustment, the lessee could avail itself of the

5/ In FMC Wyoming Corp. v. Hodel, 816 F.2d at 501, the court held 12-1/2 percent of the value of the coal was the proper production royalty for coal mined by strip or auger methods.

relief afforded by 43 CFR 3473.3-2(d) and file for a reduction of royalties. Upon the next readjustment of the lease, the lessee could seek to show that a more permanent reduction of the lease term was warranted under 43 CFR 3473.3-2(a)(3).

Id. at 247.

In a recent decision involving the review of another Ark Land Company case, Ark Land Co., 86 IBLA 153 (1985), the United States District Court for the District of Wyoming cited the above-quoted rationale with approval and applied it to that case where Ark Land was not currently involved in underground mining and had no plans to do so in the near future. Ark Land Co. v. Hodel, No. C85-313-K (D. Wyo. Oct. 1, 1987) (Slip Op. at 13-14).

The record on appeal indicates U-0149084 is a nonproducing lease associated with Coastal States Energy Mine No. 1 and that production is not expected in the near future. ^{6/} For the above reasons, we affirm BLM's imposition of the 12-1/2 percent royalty rate for coal removed by surface operations and the 8-percent royalty rate for coal removed by underground operations as part of the readjusted lease terms.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

John H. Kelly
Administrative Judge

^{6/} Memorandum to Chief, Mineral Adjudication Section, Utah State Office, from Chief, Branch of Mining Law and Solid Minerals, dated Aug. 17, 1984.

